

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION
JUDGMENT

Case Title: ROBERT SHILIPPO vs WELWITSCHIA WINGS INVESTMENTS CC 1 ST DEFENDANT EPAFRAS HAIFIDI 2 ND DEFENDANT ANNA HAIMBODI 3 RD DEFENDANT OWATO INVESTMENTS CC 4 TH DEFENDANT STANDARD BANK LIMITED NAMIBIA 5 TH DEFENDANT BRAVE ALUMINIUM & GLASS CC 6 TH DEFENDANT	Case No: HC-MD-CIV-ACT-CON- 2021/01409 Division of Court: High Court (Main Division)
Heard before: HONOURABLE LADY JUSTICE CLAASEN	Date of hearing: 29 March 2023 Delivered on: 20 April 2023
Neutral citation: <i>Shilipipo vs Welwitschia Wings Investments CC</i> (HC-MD-CIV-ACT-CON- 2021/01409) [2023] NAHCMD 207 (20 April 2023)	
Order: 1. The application for summary judgment is dismissed.	

2. The resultant costs are to be costs in the cause.
3. The defendant is granted leave to defend the action
4. The case is postponed to 3 May 2023 at 08:30 for a Case Planning Conference hearing
5. The parties shall file a joint case planning report by no later than 27 April 2023.

Reasons for orders:

CLAASEN J:

Background

[1] The plaintiff avers that he concluded a written agreement during February to June 2018 in terms of which the first defendant had to build a house and supply the building material against the payment of N\$ 638 020. The second defendant is described as the managing member of the first defendant and the third defendant is the spouse of the second defendant.

[2] It is the plaintiff's case that shortly after the agreement, the parties orally amended the specifications of the structure and that the first defendant breached the agreement, causing the plaintiff to suffer financial damages. The particulars of claim set out four claims sounding in money. However, in this application, the plaintiff only seeks summary judgment for a portion of the amount in claim one, namely N\$ 112 068.29 which claim is described as damages suffered because the plaintiff was forced to engage the services of other contractors to complete the building work.

[3] The other claim for which summary judgment is sought, is a portion of the amount in claim four, namely N\$ 34 467.17 This claim is described as unjustified enrichment, alternatively damages suffered because of a false misrepresentation on a quote which quoted 28 windows, but only 9 windows were required. It is the plaintiff's case that the financier, paid the full amount to the first defendant. In addition, the plaintiff seeks a declaratory order deeming the first defendant to not be a juristic person, and that the second and/or third defendants be held personally liable, alternatively jointly and

severally liable with the first defendant, for payment of the debts claimed herein, including interest and the costs of the suit. The application is opposed.

Summary of submissions

[4] Counsel for the plaintiff, Ms Haufiku explained how the plaintiff arrived at the amounts as claimed in the summary judgment. In respect of claim 1, the plaintiff only has receipts for N\$ 112 068.29 though the initial amount was N\$ 233 208.42. As for claim 4, the amount claimed is calculated by deducting the cost as quoted for 28 windows minus the cost of 9 windows as quoted.

[5] As for the defence that was postulated, namely, that it was the plaintiff who committed the breach of contract and colluded with fourth defendant, counsel for the plaintiff argued that the defence does not amount to a bona fide defense. In particular counsel for the plaintiff submitted that it is not based on facts and that the first, second and third defendants have not provided solid evidence thereof.

[6] Furthermore, the heads of argument of the plaintiff, contain an argument that the second and third defendant grossly misused the juristic personality of the first defendant, as a separate entity and thereby, fraudulently induced the plaintiff into concluding a contract with the first defendant.

[7] Counsel for the first, second and third defendants started his arguments with the issue of a close corporation having a separate legal identity. He argued that piercing of the corporate veil cannot take place in a summary and arbitrary manner in which the plaintiff now seeks, as part of a summary judgment.

[8] He reiterated the defence postulated by the latter defendants, namely, that it was the plaintiff who committed breach, through its refusal to pay the defendants and rendered it impossible to complete the structure. He referred the court to paragraphs in the answering affidavit that raise triable issues. He argued that payments were made by the plaintiff until August 2018 but thereafter, the plaintiff diverted payments to the fourth defendant, builders and suppliers. As regards to claim 4, the argument was that it was

the plaintiff who colluded with the sixth respondent to give a quotation for 28 windows. He also drew attention that the period of completion is also in dispute. All these, he contends, requires oral evidence. He argued that this application was brought prematurely and frivolously and asks costs on a punitive scale.

Legal Considerations

[9] The granting of summary judgment is restricted to specified instances, such as claims:

- a) based on a liquid document;
- b) for a liquidated amount in money;
- c) for delivery of specified movable property; or
- (d) for ejectment.

[10] It is trite that 'summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action.'¹

[11] Furthermore, there are different ways in which a defendant can avert the granting of summary judgment. One of them is by deposing to an affidavit, which, if true would amount to a defence. In order to persuade the court, the affidavit needs to meet certain requirements. In that respect it was stated in *De Savino v Nedbank Namibia Ltd*² that:

'...the affidavit must 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

¹ *Government of the Republic of Namibia v Gertze* (HC-MD-CIV-ACT-OTH-2019/00978) [2019] NAHCMD 497 (30 October 2019).

² *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

[24] The enquiry that the court must conduct is foreshadowed in rule 32(3) (b) and it is this: first, has the defendant 'fully' disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law³. If the court is satisfied with these two grounds, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

[25] While the defendant is not required to deal 'exhaustively with the facts and the evidence relied upon to substantiate them', the defendant must at least disclose the defence to be raised and the material facts upon which it is based 'with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence'⁴. Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the rule.'

[12] Having considered the claims and the defence, clearly there are triable issues for adjudication. This court is satisfied that the answering affidavit and its annexures have disclosed a factual basis sufficient 'which will enable the court to say that there was some reasonable possibility, that something will emerge at the trial, and that the defendant would be able to establish its defences'.⁵

[13] In addition, I concur with counsel for the defendant that counsel for the plaintiff is mistaken insofar as she believed that it was appropriate to include a prayer for piercing of the corporate veil in a summary judgment application.

[14] In the premises, the following order is made:

1. The application for summary judgment is dismissed.
2. The resultant costs are to be costs in the cause.
3. The defendant is granted leave to defend the action
4. The case is postponed to 3 May 2023 at 08:30 for a Case Planning Conference

³ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A – C.

⁴ *Supra* at 426C – D.

⁵ *Tungeni Africa Investments (Pty) Ltd v Namibia Water Ski Club and others* (I 2735) [2016] NAHCMD 232 (12 August 2016).

hearing 5. The parties shall file a joint case planning report by no later than 27 April 2023.	
Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff/Applicant	Defendant/Respondent
Ms Haufiku Haufiku & Associates Swakopmund	Mr Halweendo Nafimane Halweendo Legal Practitioners Windhoek